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MAR 26 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

82600-5

NO. 26541-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant,

V.

MARK JOSEPH AFANA,

Defendant/Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Mark Joseph Afana relies upon the undisputed findings of fact entered by the trial court following the CrR 3.6 hearing. (CP 24; Appendix "A")

ARGUMENT

The State does not challenge any of the trial court's findings of fact. They are therefore verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The State does challenge the trial court's Conclusions of Law 2, 3, 4, 5, and 6. Conclusions of law entered following a suppression hearing are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Deputy Miller saw a car parked at the corner of Rimrock and Houston in Spokane County. He parked his patrol car behind the vehicle and spot-lighted it. He saw two (2) people inside. (Findings of Fact 1 and 2)

When he contacted the driver and passenger he saw that they were watching a movie on a portable DVD player. He advised them to go someplace else to watch the movie.

However, prior to allowing them to leave he obtained Mr. Afana's driver's license, wrote down the information, returned the license, and then obtained identification from the passenger. (Findings of Fact 3 and 4)

The trial court concluded that this contact between Deputy Miller and the passengers of the parked car was not a "social contact." Rather, it was an investigation.

The State does not challenge Conclusion of Law 1 which states:

1. The defendant and the female passenger were parked watching a movie, **not violating any law. The deputy treated this as a suspicious circumstance.** There is no evidence either person in the car acted nervously or furtively.

(Emphasis supplied.)

The State relies upon *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997) for the proposition that a request for identification, without more, does not result in a seizure.

What the State ignores is that Deputy Miller was neither performing a community caretaking function; nor merely making a "social contact."

... Washington cases ... have applied the community caretaking exception to search

and seizure of automobiles, emergency aid situations, and routine checks on health and safety. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001).

State v. Schroeder, 109 Wn. App. 30, 37-38, 32 P.3d 1022 (2001).

There are no facts in the record to support that an emergency existed.

There are no facts in the record to indicate that Deputy Miller's purpose was to check on anyone's health or safety.

Even if the initial contact could be considered part of the community caretaking function, it came to an end when the deputy saw Mr. Afana and his passenger watching a DVD movie.

There was no independent fact or circumstance indicating that either occupant of the car was involved in any criminal activity.

The community caretaking function derives from *Cady v. Dombrowski*, 413 U.S. 433, 441, 37 L. Ed.2d 706, 93 S. Ct. 2523 (1973). It is to be applied cautiously so as to avoid abuse by law enforcement.

Deputy Miller was not investigating a traffic infraction.

Deputy Miller was not investigating a crime.

Deputy Miller, for some unfathomable reason, developed a suspicion over a legally parked vehicle. (RP 16, ll. 8-12)

It is this type of inarticulate hunch or speculation that must be curtailed under the limitations imposed by the community caretaking function.

Mr. Afana further contends that the State's reliance upon *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005) runs counter to the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

The Fourth Amendment provides, in part:

The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated

Const. art. I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

It is apparent from recent cases that a lack of consensus exists as to what constitutes a "stop" for both Fourth Amendment and Const. art. I, § 7 analysis. *See: State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005) (stop of vehicle Oregon trip permit and continual escalation of contact with passenger over identification); *State v. Mote, supra* (parked car in high crime area with interior lights on and occupants appear nervous); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (driver parked in lot of business recently burglarized, revoked driver's license, plain view of drug paraphernalia); *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998) . (initial social contact; but abandoned property issue determinative) and *State v. Carney*, 142 Wn. App. 197 (2007) (majority, concurring and dissenting opinions)

"Stop" is defined as follows by BLACK'S LAW DICTIONARY (8th ed.): "under the Fourth Amendment, a temporary restraint that prevents a person from walking away."

When Deputy Miller asked for Mr. Afana's identification, and also obtained identification from the passenger, neither was free to leave. They were stopped.

Moreover, since no observation of any criminal activity was observed a request for the passenger's identification was clearly unwarranted. *See: State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).

As was set forth by the Court in *State v. Larson*, 93 Wn.2d 638, 642, 611 P.2d 771 (1980):

... [A] stop based on a parking violation *committed by the driver* does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers.

Mr. Afana additionally contends that much of the supposed distinction between a passenger and a pedestrian is mere semantics. It is necessary to revert to source material in ascertaining whether or not a legitimate contact occurs between law enforcement and a citizen.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968), a comprehensive analysis of the citizen-law enforcement dichotomy was conducted. The first paragraph of the decision reads:

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Terry v. Ohio, *supra*, 392 U.S. @ 4.

Contact between law enforcement and a citizen on the street may be a vehicle stop or a pedestrian stop.

"The Fourth Amendment provides ... [an] inestimable right of personal security [which] belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study" *Terry v. Ohio, supra*, 392 U.S. 8-9.

Moreover

"[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). We have recently held that the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967)

Terry v. Ohio, supra 9.

It is clear that the distinction which the State attempts to draw between a pedestrian and a passenger cannot withstand constitutional scrutiny.

The trial court applied a "totality of the circumstances" test and determined that the passenger was indeed a passenger, and not a pedestrian.

... "under article I, section 7 [of the Washington Constitution], law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request." *Rankin* [*State v. Rankin*, 151 Wn.2d 689, 92 P.3d

202 (2004)] at 699. *Rankin* further stated, **“a mere request for identification from the passenger for investigatory purposes constitutes a seizure.”** *Id.* at 697. An “independent basis” is an “articulable suspicion of criminal activity.” *Id.* at 699.

State v. Brown, supra, 796. (Emphasis supplied.)

There can be no legitimate basis to contact a legally parked vehicle without observing some type of activity inside the vehicle indicative of the presence of contraband or a crime.

Automobiles provide a protective barrier around the person. Invasion of that protective layer by the police, without authority of law, is constitutionally impermissible.

Deputy Miller had no reasonable articulable suspicion of criminal activity. He did not even know there were any passengers in the car until he spot-lighted it.

If the State’s argument that “reasonless contacts are at the heart of social contacts by police” is to be accepted, then both the Fourth Amendment and Const. art. I, § 7 will have no future efficacy.

CONCLUSION

Deputy Miller’s contact was not a social contact.

There is no evidence that he was seeking to help either occupant of the car.

There is no evidence to indicate that there had been any ongoing problems in this area of the County.

There is no evidence to indicate any criminal activity on the part of either occupant of the car.

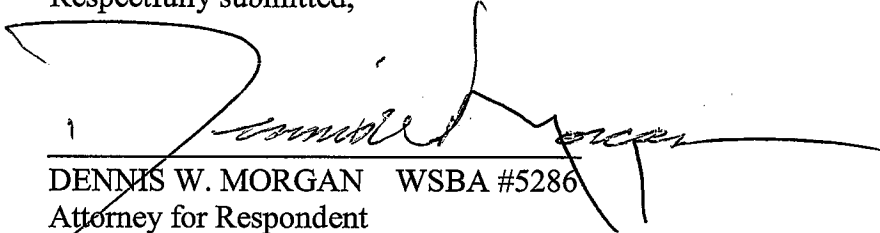
Deputy Miller's contact was not a "Hi! How are you?" type of contact.

The trial court's findings of fact and conclusions of law are comprehensive and well-founded.

The trial court's order suppressing the evidence should be affirmed.

DATED this 25th day of March, 2008.

Respectfully submitted,



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ADDITIONAL STATEMENT OF AUTHORITIES

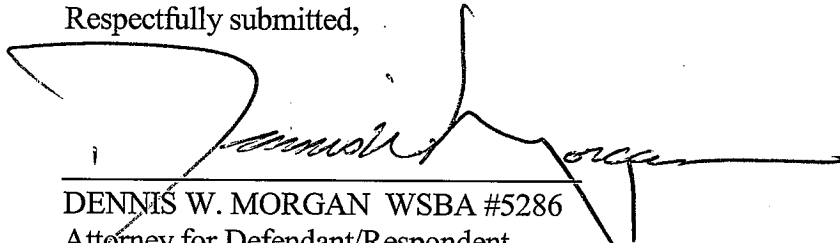
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COMES NOW, MARK JOSEPH AFANA, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

State v. Holmes, 569 N.W.2d 181, 185 (1997) (a police officer who merely has reasonable suspicion that a parking violation has occurred cannot seize an individual for the purpose of investigation).

DATED this 3rd day of April, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line.

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ADDITIONAL STATEMENT OF AUTHORITIES



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SECOND ADDITIONAL STATEMENT OF AUTHORITIES

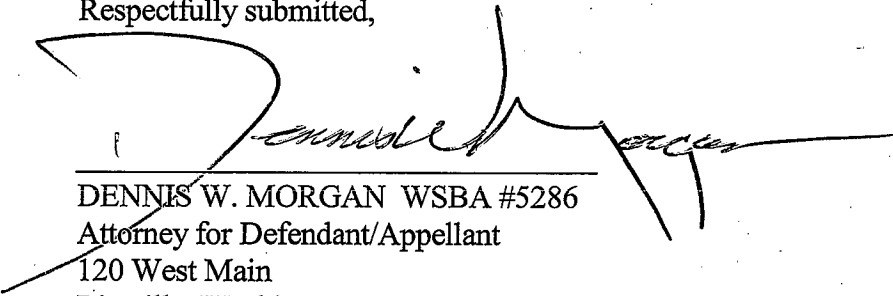
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COMES NOW, MARK JOSEPH AFANA, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

State v. Martinez, 135 Wn. App. 174, 182, 143 P.3d 855 (2006) (there must be some suspicion of a particular crime or a particular person, and some connection between the two, in order to validate a stop of a person/vehicle).

DATED this th11 day of August, 2008.

Respectfully submitted,



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APPENDIX “A”

1. On June 13, 2007 at 3:39 a.m. Deputy Miller spotted a vehicle he felt was suspicious parked at the corner of Rimrock and Houston in Spokane County.

2. He pulled in behind the vehicle and shined his spotlight on it, and saw two people inside.

3. He approached the vehicle and asked what they were doing. The driver said he and the passenger were watching a movie on his portable DVD player.

4. The deputy asked the defendant for his driver's license, wrote down the information, and returned the license. He then asked the passenger for her identification and the passenger verbally provided her name. The deputy then told the two that they should go someplace else to watch their movie.

5. The deputy returned to his car and ran checks on the defendant and the passenger. The passenger had a local misdemeanor warrant. The deputy then turned on his overhead emergency lights to prevent the vehicle from leaving.

6. He reapproached the vehicle and arrested the passenger on the warrant. The deputy then had the defendant exit the vehicle. He searched it incident to the arrest of the passenger and found suspected meth, marijuana, and paraphernalia in a bag in the defendant's car. The defendant was arrested for possession of a controlled substance and subsequently charged.